MANGI ENVIRONMENTAL GROUP, INC.,	)	**AGBCA Nos. 2005-101-1**
	)	**2005-102-1**
Appellant	)	**2005-103-1**
	)	
Representing the Appellant:	)	
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OPINION OF THE BOARD OF CONTRACT APPEALS

March 7, 2006

Before POLLACK, VERGILIO, and STEEL[1], Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO.

On September 29, 2004, the Board received a notice of appeal from Mangi Environmental Group, Inc., of Falls Church, Virginia (contractor), involving the U. S. Department of Agriculture, Forest Service (Government). The Government entered into a contract, No. 43-24H8-0-2385, under which the Government would obtain an assessment of the environmental impacts that may occur as a result of leasing federal lands for the exploration, development, and production of oil and gas within the Finger Lakes National Forest, located within Seneca and Schuyler counties in New York.

[1] Administrative Judge Steel, of the Department of Interior Board of Contract Appeals, sits by designation of the Secretary of the Department of Agriculture.

The notice of appeal relates to the contracting officer's decision dated June 30, 2004. That decision granted the contractor $2,832.29 (plus interest) on the contractor's claim to recover $151,720. The Board assigned three docket numbers to this appeal: AGBCA No. 2005-101-1 involves what the contracting officer identifies as a claim for $63,907.18 relating to alleged growth in technical leads efforts and related issues; the contracting officer found the contractor entitled to $900.13. AGBCA No. 2005-102-1 involves what the contracting officer identifies as a claim for $87,813.44 relating to increased data gathering efforts; the contracting officer found the contractor entitled to $1,932.16. AGBCA No. 2005-103-1 involves what the contracting officer identifies as the contractor's claim under an alternative theory of relief, namely, the contractor premising its entitlement on a level-of-effort contract. The contracting officer denied this basis of relief, concluding that the contractor had confirmed its intent to enter into a firm, fixed-cost contract, not a level-of-effort contract.

In the complaint, the contractor identifies two counts. Under count I, captioned changes to scope of work and method of performance, the contractor asserts that the Government interfered with and changed the contractor's specific plan of performance thereby increasing the contractor's costs of performance. Specifically, the contractor maintains that the Government failed to produce in a timely, efficient, and reasonable manner Government-furnished information, and that the Government expanded the scope of data requirements needed for completion of tasks under the contract. Further, the contractor asserts that release language, which it had signed, does not limit this claim because the release must be construed narrowly, and the language fails to show an unequivocal intention to release.

Under count II, captioned unilateral increase in level of effort, the contractor characterizes the contract as a level-of-effort term contract. The contractor asserts that the Government insisted upon completion of the contract after the contractor had expended the proposed level of effort, thereby entitling the contractor to recover the costs associated with performance above and beyond the level of effort that was offered and accepted.

The Board has jurisdiction over this timely-filed matter pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA). Following the submission of the appeal file, complaint, and answer, the parties engaged in informal discovery. Before the completion of discovery, the Government submitted a motion for summary judgment, the contractor a response in opposition, and the Government a reply.

In its motion, the Government requests that the Board conclude that the underlying contract is a firm, fixed-price contract, not a firm, fixed-price level-of-effort contract. Thus, the Government asks that the Board deny count II of the claim and complaint. Material facts are undisputed regarding count II; resolution requires a determination of the type of contract entered into by the parties. The solicitation indicated that the Government intended to enter into a firm, fixed-price contract to obtain identified, delivered products or specified services. Prior to award, any ambiguity raised by the contractor in its initial submission, was resolved by its response to a clarification request. The contract cannot be construed as a level-of-effort contract. The Board grants this aspect of the Government's motion, and denies the appeal in AGBCA No. 2005-103-1.

The Government further asks that the Board conclude that the firm, fixed-price contract, with a Changes clause permitting contract modifications only with bilateral, written agreements, prohibits an increase in the contract price absent such a modification. Because no such modification occurred, the Government contends that it cannot be liable for the alleged costs. Moreover, noting that the contractor has not expressly raised a constructive change as a theory for relief, the Government states that the clause does not permit a constructive change in these circumstances and that the contractor cannot prove the necessary elements of a constructive change. The Board does not interpret the contract to preclude price adjustments if, as the contractor alleges, the Government interfered with and altered the work of the contractor. Accordingly, the Board denies these aspects of the Government's motion.

FINDINGS OF FACT

The solicitation and contract

1. Mangi Environmental Group, Inc. and the General Services Administration had entered into a multiple award federal supply schedule contract for environmental advisory services, contract No. GS-10F-0032J. (Exhibit A at 123 (all exhibits are in the appeal file).) This contract, which permitted agencies to place delivery orders thereunder, contained the Contract Terms and Conditions--Commercial Items clause (May 1997) (48 CFR 52-212-4). The Changes, Disputes, and Payment clauses are found therein. The Changes clause states: "Changes in the terms and conditions of this contract may be made only by written agreement of the parties." The Disputes clause includes the following: "Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal, or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract." The Payment clause states, in pertinent part: "Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in the contract." (Exhibit A at 125 (¶¶ (c), (d)), 126 (¶ (i)).)

2. In a letter dated May 25, 2000, to Mr. Mangi, the Government stated, in pertinent part:

> Enclosed is a Request for Quotation (RFQ) based upon your firm[']s GSA Federal Supply Schedule Contract for Environmental Planning, Services, and Documentation, SIN 899-1.
>
> We plan to award a single task order for a firm fixed price. All costs associated with the proposed project including travel and per diem expenses should be included in that price.
>
> Enclosed in the RFQ are evaluation criteria that will be utilized in determining a best value source selection by the Government. Please make sure that your response to this RFQ addresses each criteria that is listed. Your cost should be broken down,

> which will be utilized to demonstrate your proposed level of effort planned, as well as, utilized to evaluate your understanding of the project.
>
> The Forest Service currently has $100,000.00 available for this project. If your price for the total project should exceed that amount, then please submit both your total price for the completed project and what portion of the project that could be completed at a firm fixed price under that threshold. Additionally, if you could only do part of the project indicate if you would be willing to give us an option to pick up the rest of the work; at what price, and until what date we would be able to exercise the option.

(Exhibit B at 2.)

3. The solicitation specifies that by statute, federal agencies are required to prepare an environmental impact statement (EIS) prior to taking action or authorizing actions on federal lands when such actions may significantly affect the quality of the human environment. The Government seeks an EIS to assess the environmental impacts that may occur as a result of leasing federal lands for the exploration, development, and production of oil and gas within the Finger Lakes National Forest, located within Seneca and Schuyler counties in New York. (Exhibit B at 5 (¶ I.A.).)

4. The solicitation identifies the products to be delivered. "The contractor will prepare a Draft EIS (DEIS), Final EIS (FEIS), a FEIS Summary (together with all the interim steps and support work, . . .) and a complete project file within the time frame described in **Section III**." (Exhibit B at 6 (¶ II.A).)

5. Section III of the solicitation specifies the time of delivery and when payments will be processed:

> The Government requires delivery to be made according to the following schedule **shown as calendar days following the effective date of the notice** to proceed. Progress payments will be processed based upon acceptance of all phases of work to that point.

Item Number & Name	**Delivery Date & (Quantity)**	**Approval (days)**	**Payment Schedule**
Phase I			
1. Identification of internal concerns and public issues resulting from public scoping	30 days	40 days	

2. Description of the affected environment & possible alternatives	62	77	25%
3. PDEIS including all graphics, appendices, summary & project file	168 (20 Copies)	183	25%
Phase II			
4. Revised DEIS and summary	198 (6 copies)	229	25%
5. DEIS to public	229 (300 copies)	289	
6. PFEIS and summary	364 (20 copies)	395	
7. FEIS and ROD to public	441 (300 copies)	441	
8. Project complete delivery including two complete sets of project files	441	441	25%

(Exhibit B at 10 (¶ III.A).)

6. The solicitation identifies the obligations of the contractor, including the following:

> The Contractor will furnish all labor, equipment supervision, transportation, supplies, and incidentals, except those designated as Government furnished, to perform all work necessary for completion of the EIS in accordance with the specifications contained in this RFP.[2] Payments to the contractor will be made under a time/materials contract with a payment schedule as shown in **Section III** of this document.
>
> The Contractor will meet with Agency personnel at the onset of the contract and periodically thereafter as mutually determined necessary. A minimum of six

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[2] The reference to an RFP, a request for proposals, is inconsistent with both the issuance of an RFQ and with the solicitation that indicates that the Government conducted a sealed bid procurement (Appeal File at 10, 386-87; Exhibit 16 at 2, 50 (¶ K.6), 65).

> meetings, in addition to attendance at public scoping is anticipated for the completion of this project. These meetings would be for: (a) pre-work, (b) finalizing issues, (c) finalizing alternatives, (d) revisions based on internal comments on PDEIS [preliminary draft EIS], (e) revisions based on public comments on DEIS, and (f) review comments on FEIS.
>
> The need for any additional meetings will be jointly determined. Frequent telephone conversations with the Forest Project Leaders and individual Project Team members are anticipated. Meetings will be held either at the FLNF Office in Hector, NY or at the GMFL Supervisor's Office in Rutland, VT, unless mutually agreed otherwise.
>
> Contractor's Project Manager or a mutually agreed to representative will attend all meetings held to gather public comments on the DEIS. It is estimated that a minimum of three to five such meetings may be necessary. After the release of the DEIS, the Contractor or their representative will attend additional public hearings arranged by the FS to receive comments relating to the DEIS.

(Exhibit B at 8 (¶ II.B).) Also, the solicitation specifies that the contractor is to furnish "all equipment, labor, transportation and incidentals necessary to perform the work required in accordance with the terms, conditions, and specifications of the RFP and resultant contract." (Appeal File at 15.)

7. The obligations of the Government are also specified. For example, "There will be detailed reviews by this [Government] team of Contractor's work and continual need to adjust inventory data, analysis documentation, presentation, and information displays as work on the EIS progresses." Also, "The [Government] will provide those support materials, when identified as the source, in Appendix A and Table 1 of Appendix C in timeframe that meets the contractor's works schedule and timeframe established in Section III." (Exhibit B at 9 (¶ II.D).)

8. In addition to identifying the evaluation criteria, the solicitation specifies what is to be submitted for evaluation, including:

> The contractor must display both total fixed price for the project and a breakdown of their costs to demonstrate the reasonableness of their price as well as their understanding of project. The Contractor's technical proposals submitted in response to this RFP must show the specific procedures and methodologies to be performed to fulfill the requirements of this SOW in the analysis of the impacts from oil and gas exploration, development, production, and final reclamation within the Project Area and in the preparation of the EIS.

(Exhibit B at 20 (Appendix D (¶ B.4)).)

9. In its response to the request for quotation, Mangi includes a section captioned "Rationale for Fixed Price." It states that the

> section describes in detail Mangi's draft work plan on which we based our fixed price proposal. The detailed fixed price proposal is included in Appendix A.
>
> The draft plan consists of 12 tasks that address the requirements of the Forest Service's statement of work. The tasks are:
>
> 1. Schedule and participate in a pre-work meeting;
> 2. Initiate the FLNF EIS;
> 3. Identify internal concerns and public issues resulting from public scoping;
> 4. Gather and review relevant data;
> 5. Describe the affected environment and possible alternatives;
> 6. Conduct the impact prediction and assessment;
> 7. Prepare the preliminary internal review Draft EIS;
> 8. Prepare the DEIS;
> 9. Provide the DEIS to the public;
> 10. Prepare the preliminary internal review of Final EIS;
> 11. Provide the FEIS and Record of Decision to the public; and
> 12. Post FEIS obligations.
>
> Continuous coordination with the Forest Service and BLM [Bureau of Land Management], and step-by-step project technical development are cornerstones of Mangi's plan. Thus, the plan provides the Government with the flexibility to adjust to all project issues as they arise and to determine Mangi's role during the continuing development of the EIS. This will help ensure that the EIS is prepared correctly, on time, and within budget.

(Exhibit B at 86.) Within this section of its submission, for each task Mangi identifies its expected level of effort (hours by labor category) and anticipated costs (with the statement "See Appendix A"). In discussing deliverables, by task, Mangi commits to delivering each task; it indicates no contingencies related to an anticipated level of effort being exceeded. (Exhibit B at 87, 106, 107, 109, 113, 116, 120, 121, 123, 125-27.)

10. Within the response, in Appendix A, EIS Costing, Mangi attempts to introduce contingencies into its pricing. For example, it states:

> As required by the RFP, we propose a fixed price for the entire job, as shown. But this quote carries with it the explicit provision that the level of effort on which that price is based is to be reviewed in light of the results of scoping. If the issues and tasks identified as a result of the scoping process indicate that the level of effort

> needs to be revised, either upwards or downwards, then the price would be adjusted accordingly, up or down.
>
> Similarly, the fixed quote may also have to be reevaluated as a result of the comments on the Draft EIS. Obviously, it would take far more effort to respond to 1,000 substantive comments than to 10 editorial ones.

(Exhibit B at 130-31.)

11. The quotation sheet, on which Mangi entered a lump sum price of $186,757 and the phrase "Please see accompanying proposal," does not expressly indicate that Mangi is seeking a deviation from the terms and conditions identified in the RFQ (Exhibit B at 26).

12. Mangi provided a written response to an oral request for a clarification regarding its submission. Regarding Mangi's ordering of its tasks, the response states:

> You mentioned that our discussion of Tasks 2 and 3 seemed reversed in sequence. First, I want to emphasize that we will adjust our approach here and elsewhere to fit the government's preferences. We will be fully responsive to the government. Second, let me explain that our proposed Task 2 was meant as an internal effort to identify issues and procedures, which would then be revised as needed in light of external public input received during Task 3. Our proposal did not make clear the interactive relationship between these tasks.

(Exhibit B at 208.)

13. Regarding the potential reading of the submission as offering to perform on a level-of-effort basis, Mangi states, in pertinent part:

> We apologize if our presentation led you to believe that we were offering merely a level of effort of hours rather than deliverable results. We developed our costs in a systematic fashion, by assessing the number of labor hours, by category, that we would need for each task. We showed those labor hours in our proposal in order to demonstrate to you how we arrived at the dollar figures we quoted.
>
> We believed that providing the labor basis for our fixed price quotes might be useful to you, especially because our labor rates per hour are generally substantially lower than our competitors'. That is, we thought it would be useful to you to see that for each deliverable, we plan to devote more professional hours to its development than a competitor quoting roughly the same price for that deliverable. We thought it might be relevant to a best value determination to know that Mangi works for an average of about $50/hr while our competitors typically work at $75/hr or more.

> However, we do clearly understand that your intent is to contract on a fixed price basis. That was, and is, the intent of our offer. We understand that you are buying products and results, not just labor hours. We regret if our providing information on hours distracted from that core fixed price premise.
>
> As you indicated, you are fully aware of the inherent uncertainties at this stage of such an undertaking. You indicated that you would be prepared to revisit the costs for various tasks as new information becomes available, or new developments occur, during the course of this effort. In light of this, we have been able to refine our cost proposal significantly. The refined proposal assumes that the information and data as described in the RFP will be readily available in a timely manner from the sources indicated. We also assume that no extraordinary issues or requirements arise other than those already indicated in the RFP. We further assume that the public and agency review comments will be modest in scope and quantity, requiring, as indicated in the RFP, a systematic content analysis and response, but relatively minor revisions to the document proper.
>
> Our revised cost proposal is enclosed. If it is not organized as you would like it to be, we would be happy to re-arrange it in any way you might direct.
>
> We are of course, prepared to be highly flexible in working with the government to respond to any changing requirements that do arise. We are very interested in supporting you in this work.

(Exhibit B at 209-10.)

14. By letter dated July 13, 2000, Mangi provides further clarification regarding its submissions. Based on various revisions noted in its letter, "the total for Phase 1 would be $88,954. The total, through distribution of the DEIS to the public, and the public hearings, ie through the end of Task 9, would be $117,462." (Exhibit B at 211.)

15. By letter dated August 2, 2000, the Government informs Mangi:

> We have accepted your Best and Final Offer for the Oil & Gas Leasing Environmental Impact Statement Project, on the Finger Lakes National Forest, Seneca and Schyler Counties, NY. The requirements are in accordance with our solicitation package R9-19-00-33 and your proposal including revisions which are incorporated by reference. This letter is your "Notice of Award" for Delivery Order No. 43-24H8-0-2385 for a total amount of $88,954.00 which is for Phase I (Steps 1 through 7). A copy of your delivery order is enclosed.

> Your proposal is included and becomes part of the contract. The Government reserves the right to exercise the option for steps 8 through 12 per your proposal up to 45 days after completion of Phase I.

(Exhibit C at 1.) As noted in footnote 1, the Board need not here sort out whether the RFQ was transformed into a request for proposals (RFP) and whether best and final offers were received. Mangi accepted the "notice of award" and proceeded with performance. A contract was entered into, with the terms and conditions as detailed in the solicitation and the submissions and clarifications of Mangi.

Performance and contract modifications

16. Performance under the contract occurred. With an effective date of October 24, 2000, by unilateral contract modification 1, the Government extended the performance period for Phase I of the project by two weeks, as requested by the contractor (Exhibit C at 4). By contract modification 2, the parties jointly altered the contract, with an effective and signed date of April 5, 2001. The first two and final three provisions of the modification state:

> 1. Mangi will make a near camera ready electronic and hard-copy draft environmental impact statement, summary, and cover letter (defined as DEIS), complete with all analysis, written sections, tables, figures, maps and appendices . . . . This DEIS will be available to the Forest Service and Bureau of Land Management on **April 18, 2001.**
>
> 2. The Forest Service and the BLM will send a team of relevant resource specialists to the Mangi office in Falls Church, VA on **April 19th** to review the DEIS with Mangi representatives having corresponding resource expertise. . . . This on-site review may result in minor changes to the DEIS . . . being jointly made by the FS/BLM team and Mangi at the time of the review. Major new issues will be negotiated for separate pricing. . . .
>
> . . . .
>
> 5. This change incorporates any and all claims contractor may have to this date except [the] following items:
>
> a. Data gathering efforts.
> b. Growth in technical leads efforts.
>
> 6. The contract price will be increased $45,000.
>
> 7. Contract remains firm fixed price.

(Exhibit C at 5-6.)

17. The contractor signed a contract release with a date of November 5, 2001. In the release, the contractor expressly identifies the following reservations:

> Required increased effort:
>
> 1. Increased requirement for expert technical leads
> 2. Increased effort to meet EIS data requirements
> 3. Increased efforts for reconciling/collating comments from different FS/BLM reviewers
> 4. Increased effort for assessment/revision of GIS information
> 5. Increased effort due to change in requirements for early deliverables Chaps 1, 3, 4
> 6. Increased effort due to changes in timing of early deliverables Chaps 1, 3, 4
> 7. Increased effort to deal with review of Chaps 1, 3 and 4 comments
> 8. Increased effort to deal with contractual issues

(Exhibit L at 79.)

18. By letter dated December 31, 2001, the contractor submitted an invoice for $151,720 said to cover the additional effort the contractor was required to expend in performing the contract. For each of the eight areas identified in the reservation quoted above, and an additional item (increased effort due to delays in developing and Forest Service concurrence on impacts analysis), the letter identifies staff hours, labor costs, consultant hours, and a total cost. The submission discusses each aspect of the invoice. (Exhibit M at 1-13.) For example, for item 1, increased requirements for expert technical leads, the submission identifies three staff individuals expending a total of 224 hours, at a cost of $15,310; it also identifies 46 consultant hours as other direct costs totaling $8,948. The discussion of this item concludes with a statement that the "total cost incurred for this additional effort of 270 hours was $24,257." (Exhibit M at 3-4.) For item 2, increased effort to meet EIS data requirements, the submission identifies eight staff individuals expending a total of 768 hours. The discussion of this item concludes with a statement that the "cost incurred for this additional effort of 768 hours was $34,285." (Exhibit M at 4-6.) From the submitted calculations, it appears that the contractor seeks to recover all of its alleged costs incurred in the performance of the contract (Exhibit M at 1, 10).

The claim and contracting officer's decision

19. Subsequent to correspondence, discussions, and unsuccessful attempts to resolve the contractor's request for additional payment (Exhibits A at 138-39, M at 1-75), the contractor submitted a certified claim, dated March 12, 2004, to the contracting officer (Exhibit M at 76-100). The claim identifies three bases for entitlement, as the contractor seeks a total of $151,720. The claim captions area 1 as involving "growth in technical lead efforts and related issues." The contractor contends that the Government imposed a requirement for the contractor to utilize high

level technical personnel, contrary to the contractor's intended procedure for staffing the project, thereby increasing its costs in a compensable manner. Further, the contractor maintains that Government delays, the increased scope and defects in Government-furnished information, and the expanded scope of the contract, required the contractor to incur expanded management efforts and associated costs. (Exhibit M at 87.)

20. The contractor concludes this aspect of its claim with the following (the Board substituting letters for the named individuals in the table):

> This additional effort required by Mangi was a part of the cascading of effects directly attributable to both the increased technical lead requirement discussed above and the inability of the Government to provide timely and accurate GFI, which led to an expanded scope of data requirements as discussed below. As such, the release language in contract modification 2 does not affect this claim. In that modification, Mangi intended to release only those areas not related to "data gathering efforts" and "growth in technical leads efforts." As you know, releases are construed narrowly. Unless there are unequivocal acts showing expressly or by necessary implication an intention to release there cannot be a release. *Bailfield Industries, Division of A-T-O, Inc.*, ASBCA No. 18057, 77-1 BCA ¶ 12, 348; *Aerojet-General*, ASBCA No. 13372, 73-2 BCA ¶ 10,164 at p. 47,838.
>
> The cost incurred for this additional effort of 224 staff hours and 66 consultant hours was $63,907.

Analyst/ Consultant	Rates	Hours	Amount
A	$81.83	260	$21,725.80
B	$66.67	160	$10,667.20
C	$53.59	360	$19,292.40
D	$135.57	66	$8,94[7].62
E	$39.44	12	$473.28
F	$39.44	32	$1,262.08
G	[$99].44	20	$1,988.80
Total			$63,907.18

(Exhibit M at 87-88.) The hours in the chart total 910. The claim does not explain the variance between the 224 hours stated as the basis of the claim and those identified in the chart, or the miscalculated total.

21. The claim identifies area 2 as involving increased data gathering efforts. The contractor maintains that the Government altered the requirements of the contract by expanding efforts to extract data from Forest Service sources, to supplement data not available from the Forest Service, to identify and coordinate with outside sources of data, and to extract and reformat data. The contractor identifies eleven subheadings within this area: effort required to accommodate changes and expansions of reasonable foreseeable development scenario; misdirection in assigning contractor the responsibility for data on the aquifer and its recharge area; lack of adequate geology information; soils data (two separate headings); lack of available data outside Finger Lakes National Forest boundaries; delays in receiving Government-furnished data; increased effort for assessment/revision of geographic information system information; erroneous forest stand data; scope growth in data requirements; basis for fixed-price for preliminary draft environmental impact statement (PDEIS); and scope growth in the PDEIS deliverable. (Exhibit M at 88-97.) The contractor concludes this area of its claim with the following (the Board substituting letters for the named individuals in the table):

> The cost incurred for these additional efforts and related impact on scheduling totaling 768 hours was $87,813.

Area 2: Costs Related to Increased Data Gathering Efforts

Analyst/ Consultant	Rates	Hours	Amount
A	$81.38	336	$27,494.88
B	$53.59	92	$4,930.28
C	$39.44	224	$8,834.56
D	$39.44	180	$7,0[99].20
E	$39.44	280	$11,043.20
F	$39.44	320	$12,620.80
G	$39.44	60	$2,366.40
H	$24.55	52	$1,276.60
I	$39.44	148	$5,837.12
J	$39.44	160	$6,310.40
Total:			$87,813.44

(Exhibit M at 97.) The hours in the chart total 1,852. The claim does not explain the variance between the 768 hours stated as the basis of the claim and those identified in the chart.

22. The claim identifies an alternative theory of relief. The contractor states that in "its June 20, 2000 proposal Mangi proposed a fixed priced, **level of effort term contract** to perform the work outlined in Solicitation R9-19-00-33." Further, it states:

> the Government did not take exception to the fixed priced, level of effort nature of the proposal. The Government did not counter-propose a fixed price, completion contract, which would have required Mangi to assume the burden of completing the assigned tasks regardless of the effort needed. The resulting contract therefore was a fixed priced, level of effort contract.
>
> For the specific tasks accepted by the Government, Mangi expended the proposed effort. Notwithstanding the level of effort contract, the Government subsequently insisted on completion of the contract. Mangi's completion of the tasks following the exhaustion of its level of effort constituted a change to the original level of effort term contract. Mangi therefore is entitled to recovery of the costs associated with performance above and beyond the level of effort that Mangi offered to an did in fact perform.

(Exhibit M at 97-98.) The contractor requests payment for its time and costs above and beyond the level of effort expended as required under the contract.

23. It is undisputed that the contracting officer received the claim on March 17, 2004 (Exhibit M at 101, 102). In a detailed decision, the contracting officer provides a factual background and a discussion and resolution of each aspect of the claim (Exhibit M at 102-19). In the amount of $900.13, the contracting officer partially grants the area 1 claim for growth in technical leads. In the amount of $1,932.16, the contracting officer partially grants the area 2 claim for increased data gathering efforts. Concluding that by letter dated July 1, 2000, the contractor confimed that it was proposing a firm, fixed cost contract, the contracting officer denies the alternative theory of relief (based upon a level-of-effort contract). (Exhibit M at 113, 118.) On July 15, 2004, the Government processed payment to the contractor in the amount of $2,869.54 ($2,832.29 (= $900.13 + $1,932.16) plus $37.25 (in interest)) (Exhibit M at 120).

The complaint

24. On September 29, 2004, the Board received a notice of appeal from the contractor. Thereafter, in its complaint, the contractor raises two counts. In count I, with a heading of "Changes to Scope of Work and Method of Performance," the contractor maintains that the Government: (a) interfered with and changed the contractor's specific plan of performance, (b) failed to produce Government furnished information in a timely, efficient, and reasonable manner, and (c) expanded the scope of data requirements needed for the contractor to complete tasks under the contract. (Complaint at 27-28 (¶¶ 72-77).) The complaint concludes this section with the following:

> 78. The Government's interference in Mangi's plan of performance by causing the growth in technical leads and the lack of consistent, reliable, and complete GFI [Government furnished information] also gave rise to other administrative issues that increased Mangi's costs, such as the difference between the Forest Service revised post-award expectation with respect to the content, comprehensiveness, and polish of the early project deliverables and Mangi's understanding of the use of working documents for review purposes.
>
> 79. This additional effort required by Mangi was a part of the cascading of effects directly attributable to both the increased technical lead requirement and the inability of the Government to provide timely and accurate GFI, which led to an expanded scope of data requirements.
>
> 80. As such, the release language in contract modification 2 does not affect or limit in any way Mangi's claim as outlined in this Complaint, considering that (1) releases are to be construed narrowly and (2) unless there are unequivocal acts showing expressly or by necessary implication an intention to release there cannot be a release.
>
> 81. Mangi has been injured by the Agency's actions outlined above in the amount of $151,720, plus applicable interest, costs, and attorneys fees.

(Complaint at 28-29.)

25. Count II, with a heading of "Unilateral Increase in Level of Effort," rests upon the contractor's contention that it entered into a level-of-effort contract. The contractor maintains that its "completion of the tasks following the exhaustion of its level of effort constituted a change to the original level of effort term contract." Without again quantifying an amount, it claims entitlement to recover "the costs associated with performance above and beyond the level of effort that Mangi offered to and did in fact perform, plus applicable interest, costs, and attorneys fees." (Complaint at 29 (¶¶ 82-83).)

DISCUSSION

With a motion for summary judgment, the moving party bears the burden of establishing the absence of any genuine issue of material fact; all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. At the summary judgment stage, the Board may not make determinations about the credibility of witnesses or the weight of the evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). However, it is also true that "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) (citations omitted). To preclude the entry of summary judgment, the non-movant must make a showing sufficient to establish the existence of every element essential to the case, and

on which the non-movant has the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. at 317, 322-23, 106 S.Ct. 2548, 2552 (1986). When a motion is made and supported as required in the Federal Rule of Civil Procedure 56(a), the adverse party may not rest upon the mere allegations or denial in its pleadings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324.

Type of contract

The Government requests that this Board conclude that the parties entered into a firm, fixed-price contract, not a firm, fixed price, level-of-effort contract. It contends that the contractor was obligated to complete performance on various line items, not simply expend the level of effort anticipated by the contractor. Amongst the referenced support, the Government notes the language of its letter transmitting the RFQ (indicating a plan to award a firm, fixed-price contract and specifying its budget to accomplish the given tasks) (Finding of Fact (FF) 2), the language of the solicitation (FF 5-8) and the express pre-award clarification and revision in which Mangi acknowledged that the Government was contracting for completed line items at fixed prices, not simply levels of effort expended on each or any combination of items (FF 12). In opposition to the motion, the contractor does not address the express clarification it offered to its initial submission; instead, it notes the language in Appendix A of its submission that indicated a level of effort to accomplish each task (FF 9-10). (Contractor Response at 4-6.)

The Government sought a quotation to obtain completed line items at prices within the Government's budget. The Government did not seek to obtain levels of effort at fixed prices; such would provide no assurance of completion of line items within a budget. Any potential ambiguity created by Mangi (as the drafter) in its initial submission was resolved through clarification: "We apologize if our presentation led you to believe that we were offering merely a level of effort of hours rather than deliverable results. . . . We showed those labor hours in our proposal in order to demonstrate to you how we arrived at the dollar figures we quoted." (FF 13.) The contract, particularly incorporating that clarification, cannot reasonably be interpreted to be a level-of-effort contract. The contractor became obligated to complete line items for the stated prices.

This interpretation is compelled further by the payment structure, which provides the contractor with payment only upon completion of designated tasks. Levels of efforts are not the milestones overwhich the Government was to exercise oversight; projected levels of effort were factors in the evaluation criteria such that the Government could assess understanding of the proposed contract, but not limitations on how many hours the contractor would expend for the fixed price.

The contractor has presented neither factual support nor discussion which would lead one to conclude that this contract was administered as a level-of-effort contract. That is, there is no indication that the contractor invoiced, or that the Government made payments, based upon hours expended, as opposed to tasks accomplished. There is no suggestion that, during contract performance, the contractor informed the Government of its expenditure of labor hours to accomplish any task. The Payments clause of the underlying contract (FF 1) and the payment

schedule of the specific delivery order (FF 5) indicate that payment was tied to the completion of tasks, not the simple expenditure of effort.

The contractor cites in opposition references in its initial quotation to its anticipated levels of effort to accomplish various tasks (FF 9-10). Descriptions of its proposed level of effort, and a statement that "scoping" could require a price adjustment, do not shift risks to the Government. The Government has broadly set forth the tasks to be accomplished; the Changes clause is a mechanism to make adjustments for work that changes from (i.e., is outside the scope of) that described. The contractor omits reference to its written clarification. Had the contractor sought a meeting of the minds on its now-alleged proposed deviation from the explicit terms of the Government's request, it would have had to bring such a deviation to the attention of the Government. Such a fundamental deviation is not accomplished through the language in the appendix or the passing references found in the initial submission. The explicit clarification (FF 13) indicates that the contractor accepted a contract to deliver each proposed task at the stated fixed-price. Many uncertainties inherent in such an undertaking were borne by the contractor; the stated assumptions represent business determinations. Any deviation from the fixed price would have to occur under the terms and conditions of the contract.

Moreover, the contractor has not indicated how its claim based upon an alleged level-of-effort contract is consistent with contract modification 2 (FF 16). The modification increases the contract price, states that the contract "remains firm fixed price," and specifies that the change incorporates any and all claims the contractor may have to date except for two items (data gathering efforts, and growth in technical leads efforts). The contractor has not suggested (or provided any support in the record) that its claim rests upon its exceeding its intended levels of efforts for each or any task after the modification became effective.

This is not a level-of-effort contract. To this extent, the Board grants the Government's motion for summary judgment with respect to count II. The Board denies this aspect of the contractor's claim; the appeal, AGBCA No. 2005-103-1, is denied.

Ramifications of contract type

Because a firm, fixed-price contract was entered into, the Government requests that the Board deny the claim for recovery because the contract does not contain any clause for an equitable adjustment or change, absent a bilateral, written agreement. Without a bilateral agreement, the Government contends that the contractor bore the risk of any and all increased costs, regardless of the cause or circumstances. The Government references regulation (48 CFR 16.201, 16.202-1) (a firm, fixed-price contract places maximum risk upon the contractor, with the price subject to adjustment only by operation of a contract clause), notes the Changes clause of the contract (requiring bilateral, written modification (FF 1)), and cites to and quotes snippets from various cases: Dalton v. Cessna Aircraft Co., 98 F.3d 1298,1305 (Fed. Cir. 1996) ("Because fixed-price contracts do not contain a method for varying the price of the contract in the event of unforeseen circumstances, they assign the risk to the contractor that the actual cost of performance will be higher than the price of the

contract."); Yankee Atomic Electric Co. v. United States, 112 F.3d 1569, 1579 (Fed. Cir. 1997) (where "one agrees to do, for a fixed sum, a thing possible to be performed, the will not be excused or become entitled to additional compensation, because of unforeseen difficulties are encountered."); ITT Arctic Services, Inc. v. United States, 524 F.2d 680, 691 (Ct. Cl. 1975) ("In firm fixed-price contracts, risks fall on the contractor, and the contractor takes account of this though his prices."). (Government Brief at 18-20.) The contractor addresses this aspect of the Government's motion, only in the context of a level-of-effort contract (Contractor Response at 9-10). The contractor has not addressed the question raised by the Government.

The Government reads the regulations, clause, and case law out of context, when it attempts to summarily deny the request for a price adjustment. A firm, fixed-price contract does not preclude equitable adjustments in the absence of a bilateral, written agreement. This contract expressly recognizes that equitable adjustments may be merited, and that circumstances may give rise to a dispute under the CDA (FF 1). To adopt the position of the Government would mean that the decision of the contracting officer or contractor to withhold a signature on a proposed bilateral modification would be determinative and result in no equitable adjustment, thereby keeping the contract price fixed whether work and costs are increased or decreased. Such an interpretation is inconsistent with the referenced contract provision (as well as the contracting officer's decision to adjust the contract price in response to the claim). The Government has proffered no case that demands such an interpretation and implementation of a firm, fixed price contract. The Board denies this aspect of the Government's motion for summary relief.

Constructive change

The Government devotes a section of its motion to the assertion that the contractor is not entitled to an equitable adjustment based upon a theory of Government-directed constructive change, although the Government prefaces the argument with a recognition that the contractor has not raised such a theory at this time (Government Brief at 46). The contractor states in its response:

> The Government is correct that, at this point in the progress of this claim, Mangi has not made an election of remedies and has not specifically claimed that its entitlement relies exclusively on the legal theory of constructive change. However, Mangi has alleged facts in its complaint and is preparing to provide testimony and contemporaneous documents that show that the Government interfered with and added work to Mangi's performance of the contract. At this point, whether that is characterized as a constructive change or as a breach of contract on the part of the Government is premature.

(Contractor Response at 10-11.)

Although the contractor may be inexact regarding, or continue to shift, its bases for relief, if one compares contract modification 2 (FF 16), its claim to the contracting officer (FF 19-22), and the complaint (FF 24-25), the contractor does contend that Government actions and inactions were

inconsistent with the terms and conditions of the contract or inappropriately interfered with the contractor's performance, thereby increasing the contractor's cost of performance beyond those anticipated at the time of award. As explained above, the Board does not view the Changes clause and contract as absolutely precluding an equitable adjustment.

The Government has not set forth an undisputed factual scenario that permits the Board to conclude that the Government did not breach the contract or improperly interfere with performance as suggested by the contractor. The specific Changes clause, and the contract as a whole, do not place all risk upon the contractor, foreclosing contract price adjustment for Government interference, delays, or breach. Thus, the other details of the Government's motion need not be here recited. The contractor is entitled to pursue its claim for relief, and the Board denies this aspect of the Government's motion.

Release language of contract modification 2

In arguing that the contractor cannot pursue relief under a theory of constructive change, the Government requests that the Board conclude that the contractor is bound by the release language of modification 2. The Government asserts that the contractor may only present claims that are consistent with the unreleased subject matter of the modification (data gathering efforts and growth in technical leads efforts). The Government maintains that any claims based upon an allegation of the nature of the PEDIS do not fall within these exceptions. (Government Motion at 27).

On this matter, in its response, the contractor states in full:

> The parties executed Task Order Modification 2 to address the additional effort needed from that point onward to deliver a more finished DEIS. The Government included language in the Modification effecting a release of "any and all claims contractor may have to this date except the following items: a. Data gathering efforts. b. Growth in technical leads efforts." Mangi's Claim and the causes of action outlined in its Complaint fall under these specific areas carved out in Modification 2.

(Contractor Response at 14-15) (citations to modification omitted.)

The plain language of the contract modification releases the Government from liability for any claim the contractor "may have" at that time, but for two specified areas. The contractor has yet to reconcile on the record how the various items of its requested relief fall within the limitations of the contract modification. For example, a review of the items identified in the contract release (FF 17) suggests that various of the items reflect costs incurred prior to contract modification 2, and may not be pursued given the modification and its release language. The contractor's attribution of various hours and dollars in its requests for relief (FF 18, 20, 24) also suggests that the contractor is overreaching the limitations of the contract modification. However, the Board is here resolving a motion for summary judgment, before the Government has elicited on the record a clarification of

the itemized costs claimed. The Government has not presented undisputed facts that compel a conclusion based upon the contractor-supplied headings that any particular item or dollar value of requested relief must be precluded by the contract modification. This area of the claim merits specific clarification in the further development of the record. The denial of the Government's motion does not reflect a conclusion that any given item for relief falls within or outside of the parameters of the contract modification; any such conclusion cannot be reached on the given record with the requisite presumptions.

The Board concludes that the Government has not demonstrated conclusively that any claimed item for relief is precluded by the contract modification. Therefore, the Board denies this aspect of the Government's motion.

DECISION

As detailed above, the Board grants in part the Government's motion for summary judgment. The appeal docketed as AGBCA No. 2005-103-1 is denied. The other matters, AGBCA Nos. 2005-101-1 and 2005-102-1, remain on the docket. The contractor is not precluded from pursuing an equitable adjustment; however, such relief must be consistent with the language in contract modification 2. These cases remain consolidated for purposes of developing the record; however, distinct issues should be treated accordingly.

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JOSEPH A. VERGILIO
Administrative Judge

Concurring:

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HOWARD A. POLLACK
Administrative Judge

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CANDIDA S. STEEL
Administrative Judge

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